

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



*Original & Affidavit of Mailing*

**77-1095**

To be argued by  
MARILYN GAINES

**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 77-1095**

UNITED STATES OF AMERICA,

—against—

RICHARD TRICA,

*Appellee,*

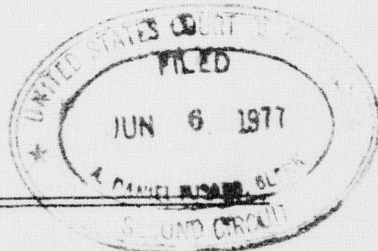
*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF FOR THE APPELLEE**

DAVID G. TRAGER,  
*United States Attorney,  
Eastern District of New York.*

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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 77-1095**

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UNITED STATES OF AMERICA,

*Appellee,*

*—against—*

RICHARD TRICA,

*Appellant.*

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**BRIEF FOR THE APPELLEE**

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**Preliminary Statement**

Appellant Richard Trica appeals from a judgment of the United States District Court for the Eastern District of New York (Neaher, J.) entered on January 7, 1977, convicting him, following his plea of guilty, of bank robbery, in violation of Title 18, United States Code, Section 2113(a), and sentencing him to a ten year term of imprisonment. He is currently serving his sentence.

On appeal appellant contends that the district court erred in denying, without an evidentiary hearing, his motion to withdraw his guilty plea pursuant to Rule 32 (d) of the Federal Rules of Criminal Procedure.

### Statement of Facts

On July 19, 1976, appellant Richard Trica was indicted for his participation on June 16, 1976 in a bank robbery of the Hamilton Federal Savings and Loan Association on Avenue U, Brooklyn, New York. The two count indictment charged appellant and two co-defendants with violations of Title 18, United States Code, Sections 2113(a), 371 and 2. On November 8, 1976 during the course of a pre-trial suppression hearing, appellant offered to withdraw his previously entered not guilty plea and to plead guilty to Count One of the indictment pursuant to an agreement the defendant's attorney had reached with the government. The agreement was that the remaining count of the indictment would be dismissed at the time of appellant's sentencing upon his plea to Count One, and that the government would not prosecute the appellant for his alleged participation in two additional bank robberies then under investigation by the government.

At the time of the guilty plea the district court entered into a discussion with appellant, eliciting certain background information. Appellant advised the court that he was 34 years old and had completed the seventh grade. (125).<sup>1</sup> The court then inquired into appellant's prior drug involvement and was informed that appellant had last used narcotics immediately prior to his arrest on July 9, 1976. Appellant acknowledged that he had not used narcotics since that date, and stated that during the ensuing period of his incarceration methadone had been administered to him as part of a detoxification process (127-128).

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<sup>1</sup> Numerals in parentheses refer to pages of the transcript dated November 8, 1976 attached as C, the separate appendix to appellant's brief.



The court thereafter ascertained whether or not any drugs had been recently administered to appellant and whether appellant had recently been under the care of any doctor. The following colloquy ensued:

The Court: Now, either this morning or yesterday, was anything administered to you by either—you know, either methadone or anything of that nature, that makes it difficult for you to understand clearly what I am saying to you here?

The Defendant Richard Trica: No.

The Court: Now, are you, aside from narcotics, have you recently been under the care of any doctor for any kind of condition, physical or mental?

The Defendant Richard Trica: Yes.

The Court: Yes?

The Defendant Richard Trica: No.

The Court: Yes?

The Defendant Richard Trica: No.

The Court: The answer is "No"?

The Defendant Richard Trica: No. (128-129).

The court continued to question appellant, as required by Rule 11 of the Federal Rules of Criminal Procedure, concerning his desire to plead guilty, his understanding of the nature of the charge to which he was pleading, the consequences of that plea and the rights appellant was waiving by pleading guilty. Also, the agreement reached between the government and appellant was set forth, in its entirety, on the record (130-136). Thereafter, appellant stated in his own words his involvement in the bank robbery (137-140). Finally, the court concluded that appellant understood the nature of the charges to which

he was pleading guilty and the consequences of that plea, determined that it was voluntarily entered and accepted the guilty plea (141-142).

On January 5, 1977 appellant moved to withdraw his guilty plea. No motion papers or affidavits were filed supporting that motion. On that date appellant was present in court with his attorney who asked to be relieved because he could not "in good conscience" go forward on appellant's motion to withdraw his plea (H. 4).<sup>2</sup> Appellant's attorney explained to the court that appellant was moving to withdraw his guilty plea on the ground that at the time of entering the plea appellant was under the influence of some type of "mood changing" medication which had been administered by prison officials and prevented him from "thinking clearly and knowingly entering into the plea." (H. 5).

At no time did appellant present any facts to the court to substantiate his statement that he was under medication at Metropolitan Correctional Center.<sup>3</sup> Nor were any sub-

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<sup>2</sup> The court subsequently denied the attorney's application to be relieved, stating as follows:

The Court: I really think you're the one most familiar with it and are in the best position to advise him. I don't believe there's anything in your conduct that deserves criticism and I cannot see at this juncture that a switch of counsel would be in his [appellant's] interest. (H. 12-13) (Hereafter, numerals in parentheses preceded by "H" refer to pages of the transcript dated January 7, 1977 attached as D to the separate appendix to appellant's brief).

<sup>3</sup> Page 18 of appellant's presentence report prepared after November 8, 1976, indicated that appellant was then receiving tranquilizing medication for nervousness and insomnia. (A copy of this report will be made available at argument for the court's

[Footnote continued on following page]

stantiating facts presented as to the type of medication involved or as to when appellant had last received such medication. Taking into consideration appellant's denial at the time of entering his plea that he was under the influence of medication, the district court made the following observations on January 5, 1977:

The Court: [Referring to the November 8, 1977 proceedings]—And, in the responses to the Court's questions indicated that he had been given methadone for a time and he was detoxified and that he was in the detoxification process. Then I asked him earlier this morning, or yesterday, was anything administered to you by either, you know, either methadone or anything of that nature that makes it difficult for you to understand what I am saying to you and his answer was "no". Then I said, "aside from narcotics, have you recently been under the care of any doctor for any kind of condition, physical or mental" and his answer to that was "yes", and then when he said that, I said "yes", and he said "no".

Then I asked him again, "is the answer no". Now, at that time his position was that he was not under any medication and it seems to me from my observation of him that he appeared to be speaking sensibly and in full possession of his faculties. (H. 6-7).

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consideration if so desired). The district court noted that it had deliberately refrained from reading this report prior to its decision on appellant's motion to withdraw his guilty plea in order not to be prejudiced in his consideration thereof by anything contained in the report. (H. 10). In any event, there was no indication in the presentence report as to whether or not appellant had received such medication on November 8, 1976, the frequency of his receipt thereof or whether these tranquilizers for nervousness and insomnia amounted to "mood changing" drugs.



The Court: I have observed this defendant on any number of occasions, and in my opinion at all times he knows what he's been doing. I'm satisfied that his plea was voluntarily made and my opinion is the excuse now offered is not worthy of belief, and accordingly, I am going to deny the application. (H. 8).

The court thus denied the application and on January 7, 1977 appellant was sentenced to a ten year term of imprisonment.

## ARGUMENT

### **The District Court Properly Rejected Appellant's Motion To Withdraw His Plea Of Guilty Without An Evidentiary Hearing.**

Prior to sentence, appellant moved pursuant to Rule 32(d) Fed. R. Crim. P. to withdraw his guilty plea, claiming that at the time of the plea he was under the influence of medication administered by prison officials and, therefore, unable to comprehend the plea proceedings. Appellant did not state when this medication had been administered or substantiate what type of medication was involved, other than his bald assertion that it was some type of "mood changing" drug. On the other hand, at the time appellant had pled guilty, he had unequivocally stated that he had not received any medication prior to pleading, and that he was not under medical care. (128-128).<sup>4</sup>

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<sup>4</sup> Appellant arbitrarily categorizes his colloquy with the district court on these matters as inconclusive. The record directly belies this contention and shows that the district court painstakingly ascertained that appellant's response to the questions of whether he was receiving medication or was under medical, "no" (128-129).

V  
CARE WAS

It is appellant's position that the district court erred in denying his application to withdraw his guilty plea without a hearing on the issue of appellant's mental condition at the time of that plea. We believe that the record conclusively demonstrates that appellant's plea was a knowing, voluntary and intelligent act,<sup>5</sup> which was made with awareness and appreciation of the likely consequences. Since appellant, represented by experienced and capable counsel, denied being under the influence of medication when he entered his plea and presented nothing more than his bald assertions to the contrary in moving to withdraw that plea, we submit, for the reasons set forth below, that the district court acted properly in denying appellant's motion without an evidentiary hearing.

## 1. Introduction

Federal Courts, following the lead of *Kerchval v. United States*, 274 U.S. 220 (1927), have uniformly held that before a defendant will prevail on a presentence motion to withdraw a guilty plea, a motion all courts recognize is a matter of discretion not of right,<sup>6</sup> it is the de-

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<sup>5</sup> We recognize that appellant's claim is predicated on facts outside the record, and where a motion under § 2255, Title 28, U.S.C. to set aside a guilty plea sets forth detailed factual allegations of circumstances outside of the record and knowledge of the trial judge which if true, would justify relief, a hearing is required. *Fontaine v. United States*, 411 U.S. 213 (1973); *Machibroda v. United States*, 368 U.S. 487 (1962). However, "every allegation of circumstances outside of the record does not establish the necessity for a hearing on the allegations, no matter how vague, conclusory or palpably incredible. *United States v. Huffman*, 490 F.2d 412, 413 (8th Cir.), cert. denied, 416 U.S. 988 (1974).

<sup>6</sup> A motion under Rule 32(d) Fed. R. Crim. P., as distinguished from a proceeding under § 2255 of Title 28, United States Code, is addressed to the sound discretion of the district court and is not a matter of right. Although, § 2255 provides, in pertinent part:

[Footnote continued on following page]

fendant's burden to show that the granting of the motion would be fair and just. See e.g. *United States v. Guiliano*, 348 F.2d 217 (2d Cir.), *cert. denied*, 282 U.S. 946 (1965); *United States v. Marshall*, 510 F.2d 792 (D.C. Cir. 1975); *United States v. De Cavalcante*, 449 F.2d 139 (3d Cir. 1971); *United States v. Simmons*, 497 F.2d 177 (5th Cir.), *cert. denied*, 404 U.S. 1026 (1972).

Before the trial court can intelligently consider whether or not the defendant has met that burden, the defendant must allege sufficient facts in support of his grounds for relief from which the court can properly determine if there is a need for a hearing. *United States v. Tivis*, 302 F. Supp. 581 (N.D. Tex 1969), *aff'd* 421 F.2d 147 (5th Cir. 1970). "[I]f the petitioner's motion alleges facts which, if true, would entitle him to relief, the Court must hold a plenary hearing. And correspondingly, if petitioner fails to allege sufficient facts to raise a fact question or presents only conclusionary allegations, or if the record conclusively demonstrates that petitioner is not entitled to relief, then no hearing need be held and the motion may be denied [citations omitted]." *United States v. Tivis*, *supra*, at 583. We submit that when measured by these standards, appellant's conclusionary allegations, unsubstantiated by specific facts, did not warrant a hearing.

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—unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusion of law with respect thereto—

there is no corresponding express hearing provision for a Rule 32(d) motion. However, without conceding the necessity for a hearing here, *Cf. United States v. Masthers*, 539 F.2d 721, 726 N. 26 (D.C. Cir. 1976); 8A *Moore's Federal Practice* § 32.07 [4] (1975), we will meet the hearing issue under the § 2255 standard urged by appellant since it is our position, that under any standard, the district court properly denied the motion to withdraw his plea of guilty.



## 2. Hearings on Claims of Mental Incompetency

In general an evidentiary hearing is required on a § 2255 motion *unless* the allegations are insufficient in law, undisputed, immaterial, vague conclusory, palpably false or patently frivolous. *Sanders v. United States*, 373 U.S. 1 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Machibroda v. United States*, 368 U.S. 487 (1962); *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970). Specifically, where the allegation is a claim of mental incompetency at the time of a guilty plea,<sup>7</sup> a hearing is required when the defendant raises detailed and controverted issues of fact. *Fontaine v. United States*, *supra*, 411 U.S. 213; *Sanders v. United States*, *supra*, 373 U.S. 1; *Wojtowicz v. United States*, — F.2d — (2d Cir. slip op. 598, decided February 22, 1977); *O'Neill v. United States*, 486 F.2d 1034 (2d Cir. 1973); *United States v. Miranda*, 437 F.2d 1255 (2d Cir. 1971); *United States v. Malcolm*, *supra*, 432 F.2d 809. On the other hand, where no evidentiary facts are alleged to support a bald assertion of mental incompetence, a hearing on the question of mental incompetency at the time of the plea is not required. *United States v. Miranda*, *supra*, 437 F.2d at 1258; *O'Neil v. United States*, *supra*, 486 F.2d at 1036; *United States v. Malcolm*, *supra*, 432 F.2d at 812. See also, *Moody v. United States*, 497 F.2d 359, 362 (7th Cir. 1974); *Bruce v. Estelle*, 483 F.2d 1031, 1037 n. 16 (5th Cir. 1973).<sup>8</sup>

<sup>7</sup> Appellant contends that medication rendered him incapable of understanding the proceedings of November 8, 1976, and, therefore, he was mentally incompetent to enter a guilty plea on that date.

<sup>8</sup> As previously noted in footnote 3, *supra* the fact that the presentence report indicated that appellant had received tranquilizing medication for nervousness and insomnia, did not amount to substantiation of appellant's conclusory assertion that at the time he entered his guilty plea he was under the influence of "mood changing" drugs of a type that prevented his understanding the proceedings on November 8, 1976.



This case does not come within the category of cases where specific factual and corroborative material was set forth.<sup>9</sup> There was not even so much as a statement by appellant as to when he had last received medication prior to the entry of the plea. Even assuming, *arguendo*, that appellant had received some type of medication on the day of his plea, appellant still would have had the burden of demonstrating "that his mental faculties were so impaired by drugs when he pleaded guilty, that he was incapable of full understanding and appreciation of the charges against him, of comprehending his constitutional rights and of realizing the consequences of his plea." *United States v. Malcolm*, *supra*, 432 F.2d at 812. The fact that a defendant has been administered sleeping pills and tranquilizers, for example, does not in and of itself, render him incompetent to stand trial or, to enter a plea. *Sheburne v. United States*, 433 F.2d 1350 (5th Cir. 1970).

The district court denied appellant's motion without a hearing because, after reviewing the record, it found appellant's allegations to be unsupported and without merit. In reviewing the record the court emphasized appellant's denial of being under the influence of medication at the time of the plea. The statements of a defendant when pleading guilty should be given great weight when he

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<sup>9</sup> *E.g.*, *Fontaine v. United States*, *supra*, 411 U.S. 213 [§ 2255 motion set out detailed factual allegations supported by documents and records, establishing treatment for addiction and severe illness]; *Taylor v. United States*, 487 F.2d 307 (2d Cir. 1973) [§ 2255 motion was accompanied by affidavit stating the specific promises made by the prosecutor in exchange for cooperation]; *United States v. Miranda*, *supra*, 437 F.2d 1255 [Records in support of petitioner's incompetency claim revealed petitioner twice attempted suicide prior to pleading]; *Sanders v. United States*, *supra*, 373 U.S. 1 [Petitioner's allegations of mental incapacity due to drug influence were replete with dates and names of alleged participants and witnesses of the daily administration of medication].

subsequently disavows those statements in seeking to withdraw his plea. *United States v. Hawthorne*, 502 F.2d 1183, 1185 (3d Cir. 1974). Since the defendant did nothing more than present vague and conclusory allegations which were rebutted by his prior unequivocal statements, the district court acted properly in denying appellant's motion without a hearing. *Tozzi v. United States*, 309 F. Supp. 26 (D.C.N.Y. 1969).

### CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

DAVID G. TRAGER,  
*United States Attorney,*  
*Eastern District of New York.*

BERNARD J. FRIED,  
MARILYN GAINES,  
*Assistant United States Attorneys,*  
*Of Counsel.*

## AFFIDAVIT OF MAILING

STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen being duly sworn,  
deposes and says that he is employed in the office of the United States Attorney for the Eastern  
District of New York.

That on the 6 day of June 19 77 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Barry W. Agulnick

32 Court St.

Brooklyn, New York 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute  
drop for mailing in the United States Court House, 225 Cadman Plaza East,  
Borough of Brooklyn, County  
of Kings, City of New York.

Sworn to before me this

6 day of May 19 77

CAROLYN N. JOHNSON  
NOTARY PUBLIC State of New York  
No. 41-4518793  
Qualified in Queens County  
Term Expires March 30, 1979



